United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/1003
26 July 2001

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1003

Case No. 1099: SHASHA'A Against: The Secretary-General of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Kevin Haugh, Vice-President, presiding; Ms. Marsha A. Echols; Mr. Omer Yousif Bireedo;

Whereas, on 15 September 1999, Zakia M.F. Shasha'a, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), filed an Application containing pleas, which read as follows:

"II. *Pleas*

8. The Applicant respectfully requests the Administrative Tribunal:

(a) To find that the administrative decision not to renew the Applicant's fixed-term contract with UNDP beyond its expiry date on 29.2.1996 was irreparably flawed by various abuse[s] of power (détournement de pouvoir).

(b) To order the Secretary-General to grant the Applicant, with retroactive effect a further two-year fixed-term appointment with UNDP and to pay her salaries from the date of her termination, 29.2.1996.

(c) Alternatively, should the Secretary-General decline to [make] such a decision, to compensate the Applicant for the violation of her rights.

(d) In either case, to award ... the Applicant compensation for the slander to which she has been subjected and for the moral and physical suffering to

> which she has been exposed as a result of the glaring abuse of power by UNDP... The compensation should [reflect] the incredible damage inflicted on her entire life, reputation, health and professional career."

Whereas the Applicant filed an additional communication on 30 August 2000;

Whereas the Respondent filed his Answer on 25 September 2000;

Whereas the Applicant filed additional communications on 30 May, 31 May, 5 June, 18 June and 20 June 2001;

Whereas the facts in the case are as follows:

The Applicant joined UNDP on a three-month fixed-term appointment on 1 December 1994, as a Secretary in the Programme Section, UNDP Field Office, Amman, Jordan. The Applicant's appointment was extended twice until 28 February 1996, when she separated from service.

On 7 November 1995, the UN Resident Coordinator and UNDP Resident Representative in Jordan (the Resident Representative) signed a Critical Incident Report in which he registered his dissatisfaction with the Applicant's work and concluded, *inter alia*:

> "... (b) that repeated reminders of a friendly nature have failed to bring about lasting and consistent improvements, and (c) that the necessity to doublecheck and repeatedly correct the correspondance [sic] processed/typed by Ms. Shasha'a is hampering the Programme Section's productivity and slowing down its output".

On 18 December 1995, the Applicant replied, attributing the errors to an "incredible workload", lack of sufficient staffing in the office and unreasonable demands of her supervisor. She also alleged that she was the target of discrimination by her supervisor who was against her assignment to the Office.

On the same day, the Resident Representative wrote to the Applicant, referring to an earlier meeting at which she was notified of his decision not to "extend [her] in [her] present post ... beyond [her] current contract period". He informed her that an internal vacancy announcement had been circulated for her post and that, as she was not suitable for other available positions with UNDP, her contract would not be renewed. He offered to provide her with a letter of reference confirming her period of service, listing a number of her positive

qualities, and explaining that her non-renewal was due to reductions in extra-budgetary funds. Such a letter was written in January 1996.

On 24 January 1996, the Applicant wrote to the Administrator, UNDP, detailing her complaints about her supervisor and requesting an investigation. The Director, Office of Human Resources, UNDP, replied on 18 March 1996, rejecting her "allegations" and confirming the decision to separate her from service upon the expiration of her appointment.

On 1 March 1996, the former Resident Representative, UNDP, wrote a positive letter of recommendation for the Applicant.

On 28 April 1996, the Applicant wrote to the Secretary-General requesting review of the contested decision.

On 5 October 1996, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 17 November 1998. Its considerations and recommendations read as follows:

> "***Considerations***:
>
> 17. As this was a case of non-renewal of a fixed-term appointment, the Panel did not attempt to evaluate the Appellant's performance, but decided to determine whether the administrative decision had been motivated by prejudice, arbitrariness, or some other extraneous factor.
>
> 18. The Panel ... had requested after its first meeting that the Respondent provide some information related to the investigation conducted in UNDP Amman prior to the Appellant's separation from service.
>
> 19. The Panel felt constrained to take account of the unreasonable delay in the Respondent's response to its inquiries. It noted that once the Respondent finally responded, his reply was inadequate and did not properly address the issues raised.
>
> 20. The Panel noted that the memorandum dated 15 June 1998 from [the Resident Representative] answered the first part of the inquiry but failed to address the second part, i.e. whether an investigation was conducted and the result of such investigation.
>
> 21. The Panel also noted that the memorandum from the Respondent merely stated that his office had conducted an investigation and that such investigation proved that the Appellant's allegations against her supervisor were baseless.
>
> 22. The Panel observed that this reply was not satisfactory since it failed to properly answer the questions contained in the original query. It noted that the Respondent did

not provide any contemporaneous evidence (i.e., telephone notes, names of witnesses interviewed, etc.) tending to show that an investigation was indeed conducted.

23. The Panel took note of the Tribunal jurisprudence that the Appellant bears the burden of proving bias, prejudice, improper motivation or other extraneous factors. ...

24. The Panel also took note of the Tribunal's Judgement No. 447, *Abbas* (1989). In that case, the Tribunal held that 'while it has not made any determination as to prejudice or discrimination against the Applicant, the procedure followed in insufficiently investigating his various complaints and the handling of his candidature were inappropriate. On these grounds, the Tribunal considers that the Applicant is entitled to compensation for the injury he suffered.'

25. Having viewed the case as a whole, the Panel noted that sound administrative practice did not appear to have been followed. It noted that the Respondent failed to adduce some evidence tending to show that a proper investigation was indeed conducted, and to provide the findings of such investigation.

Recommendations:

26. In view of the circumstances mentioned above, and in light of the *Abbas* judgement, the Panel makes the following unanimous recommendation:

27. Inasmuch as the Appellant has suffered substantial hardship because of procedural irregularities, the Panel deems it equitable to recommend that she be given compensation in the amount of US$2,500."

On 23 June 1999, the Under-Secretary-General for Management transmitted to the Applicant a copy of the JAB report and informed her as follows:

"...

The Secretary-General ... has taken note of the Board's observation that it had not received a satisfactory response to its query on whether your allegations against your supervisor had been investigated, as no contemporaneous evidence had been provided to show that an investigation had indeed been conducted. The Board thus concluded that you had suffered substantial hardship because of procedural irregularities and recommended that you be compensated in the amount of $2,500.

The Secretary-General is not in agreement with the Board's conclusion above. He considers that you did not discharge your burden of proving that the decision not to extend your fixed-term appointment was tainted by prejudice or other improper motive. Recalling the fact-finding role and powers of the Joint Appeals Board (...), the Secretary-General observes that the Board found no evidence that your allegations

bout discrimination and prejudice had any basis in fact. The Secretary-General observes that the Board's dissatisfaction with the information provided by or through UNDP Amman's Country Office cannot be construed as giving more weight to your uncorroborated allegations. In light of the foregoing, the Secretary-General cannot accept the Board's recommendation that you be paid compensation and has decided to take no further action in your case.

..."

On 21 September 1999, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contention is:

The decision not to renew the Applicant's contract was not based on her job performance or the contract expiration itself, but was motivated by prejudice, abuse of power, arbitrariness and improper motives.

Whereas the Respondent's principal contentions are:

1. The Applicant served on a fixed-term appointment which does not carry any expectancy of renewal. Satisfactory or even outstanding performance, by itself, does not create any legal expectancy of renewal. The decision not to renew the Applicant's appointment did not violate her rights.

2. The decision not to renew the Applicant's appointment was not vitiated by improper motives or any other extraneous factors.

The Tribunal, having deliberated from 5 to 26 July 2001, now pronounces the following judgement:

I. The Applicant requests the Tribunal to rescind the decision of the Secretary-General not to renew her fixed-term appointment with UNDP. Having begun her employment with the organization in December 1994 and continuing on successive fixed-term appointments, she was separated from service in February 1996 at the expiration of her last appointment.

II. The Tribunal has consistently held that, in general, an employee serving under a fixed term contract has no right to expect the renewal of the agreement, a conclusion dictated by staff rule 104.12(b). The Administration, in its discretion, may decide not to renew or extend the contract without having to justify that decision. Under those circumstances the contract terminates automatically and without prior notice, according to staff rule 109.7. (See Judgements No. 440, *Shankar* (1989); and No. 496, *Mr. B.* (1990).

III. On the other hand, when the Administration gives a justification for this exercise of discretion, the reason must be supported by the facts. (See Judgement No. 885, *Handelsman* (1998).) Under such circumstances, the exercise of discretion is examined not under the rule enunciated in Judgement No. 941, *Kiwanuka* (1999) but for consistency between the reason offered and the evidence. In this case, the conclusions that the performance of the Applicant was unsatisfactory and that no complaints had been investigated are not adequately supported by the record. The justification offered for the exercise of discretion was unconvincing and, perhaps, disingenuous. The absence of a justification for the Administration's action might have been a cause of the delays in responses to questions posed by the JAB. For these reasons, as explained in the judgement, the Tribunal awards the Applicant US$5,000.00 in compensation.

IV. The Applicant's separation from service followed the 7 November 1995 Critical Incident Report. The main assertions of that Report were challenged by the Applicant in meetings, in numerous memoranda and letters, as well as through an appeal to the JAB and her application to this Tribunal.

The Critical Incident Report noted dissatisfaction "with the general quality of work" of the Applicant. It offered as support for that evaluation sample correspondence typed by the Applicant and her failure to correct her perceived shortcomings following meetings with her supervisor. Most of the incidents reported appear to be spelling and typing errors. The Applicant responded that her mistakes were minimal (three mistakes in 81 days based on the letters attached to the Report; more than a dozen in 4 ½ months according to the text of the Report). She alleged that her errors, were caused in part by the heavy workload, lack of sufficient staffing in the office, the unreasonable demands of her supervisor and non-relevant

assignments. She also asserted that her mistakes were no different from those of other members of the secretarial staff and that she was the object of prejudice on the part of her supervisor.

V. The termination was linked to the Critical Incident Report. As stated in a crucial 18 December 1995 letter from the Respondent to the Applicant,

> "I refer to the meeting we had in my office several weeks ago during which we talked about my Critical Incident Report on your performance *and its implications*. On that occasion, I notified you that I had decided not to extend you in your current post within the Programme Section beyond your current contract period.
>
> I trust that the reason for this decision was spelled out clearly to you ... [I]t is my obligation to ensure that our Programme Section is provided with the highest quality of day-to-day secretarial support, and that we are not repeatedly slowed down or held back by the type of problems that I described in your Critical Incident Report." (Emphasis added.)

VI. Unlike in most cases of automatic expiration of a fixed term contract, when no justification is offered, in this case the failure to renew the contract was claimed to be the result of unsatisfactory performance. This reason must be borne out by the evidence. Several occurrences after the issuance of the Critical Incidents Report lead the Tribunal to conclude that the circumstances do not support the justification given. Among them is the 18 December 1995 letter from the Resident Representative to the Applicant. In it the Respondent offered to write a letter of recommendation for the Applicant that would "clarify that [she was] employed against an extra-budgetary post (as opposed to a core post), and that [UNDP was] unable to renew [her] contract due to reductions in [the UNDP] extra-budgetary funds". Later actions by the Respondent appeared to corroborate this statement as a reason for the failure to continue her employment, rather than unsatisfactory performance. Moreover, the 18 December letter referred to two other posts for which the Applicant had been considered.

VII. In a "To Whom It May Concern" letter of reference dated January 1996, the Resident Representative noted lack of funding as the reason for the non-renewal and described the Applicant as a "hard-working staff member who does not shy away from staying on in the office after normal working hours to complete assignments of an urgent nature". She was recommended to anyone needing a "dedicated and hard-working *secretary*". (Emphasis added.)

Later, on 1 March 1996 the previous Resident Representative wrote a "To Whom It May Concern" letter of recommendation, which stated that the Applicant had contributed positively to the work of her section and had performed her duties with a sense of responsibility and complete dedication.

VIII. Sometime between the 7 November 1995 Critical Incident Report and the letter of 18 December 1995, the Respondent attempted to find other duties within UNDP for the Applicant. Although it is unclear whether the two posts mentioned in the December letter required the same skills as those needed for the position the Applicant held, one post - that of a journalist – seemingly would require some of the same skills and more. The third paragraph of that same letter also seems to contradict a finding of incompetence or unsatisfactory performance. It offers a letter of recommendation and additional efforts to find employment. Specifically, the letter states:

> "To make your task of finding new employment somewhat easier, I intend, if you wish, to provide you with a letter of reference which confirms your period of employment with UNDP and lists a number of your positive qualities, e.g., your dedication to the United Nations, your familiarity with the institutions and procedures of the United Nations, your record as a hard-working staff member, etc. … In addition we will actively assist you, if you so wish, in identifying alternative employment in a sister U.N. agency, in a U.N. – funded project, or in a private sector institution here in Amman."

IX. Finally, the Respondent states that, before reaching the conclusions in the Report, it conducted an investigation of the Applicant's complaints. The JAB found the evidence of an investigation "not satisfactory", since in response to its request for information the Administration only (and belatedly) offered the unsupported statement that an investigation had been conducted and that it had proved the baselessness of the Applicant's allegations against her supervisor. The record contains no evidence of such an investigation. In fact there were delays in the JAB proceedings when the Respondent did not reply in a timely fashion to questions posed by the JAB regarding the "investigation". As a consequence, on these procedural grounds the JAB recommended that the Applicant be paid US$2,500 to compensate her for the "substantial hardship because of procedural irregularities". The Administration refused to accept that

recommendation, having concluded that the Applicant had not sustained her burden regarding her allegations of prejudice and improper motive.

X. The Tribunal finds that the Respondent offered an unsupported reason for his failure to offer the Applicant a new contract. He thus improperly exercised his discretion and, incidentally, delayed the JAB proceedings. For these reasons only, the Tribunal awards the Applicant US$5,000 as compensation for the harm she suffered as a result of the conduct of the Administration.

XI. For the foregoing reasons, the Tribunal:

(a) Orders the Respondent to pay the Applicant $5,000 in compensation; and

(b) Rejects all other claims.

(Signatures)

Kevin HAUGH
Vice-President, presiding

Marsha A. ECHOLS
Member

Omer Yousif BIREEDO
Member

Geneva, 26 July 2001

Maritza STRUYVENBERG
Executive Secretary